BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY L. PARK	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,788
SMITH TEMPORARY SERVICES	)	
Respondent	)	
AND	)	
	)	
LEGION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge Jon L. Frobish's July 19, 1999, Award. The Appeals Board heard oral argument on November 12, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 25.25 percent permanent partial general disability found by averaging a 13 percent wage loss with a 37.5 percent task loss.

On appeal, the respondent contends claimant, after he was released to return to work with permanent restrictions, did not make a good faith effort to find appropriate employment. Furthermore, the respondent argues the record established that post-injury claimant retained the ability to earn a wage comparable to his pre-injury average weekly

wage. Accordingly, respondent asserts claimant is limited to a six percent permanent partial disability award based on his permanent functional impairment of eight percent reduced by a preexisting two percent permanent functional impairment.

Conversely, the claimant contends the Appeals Board should affirm the Administrative Law Judge's 25.25 percent permanent partial general disability award based on a work disability. Claimant acknowledges, that although he was unemployed at the close of the record, the Administrative Law Judge imputed a weekly wage based on minimum wage instead of finding claimant had a 100 percent wage loss. But the Administrative Law Judge did not make a finding that claimant had not made a good faith effort to find appropriate employment to justify imputing a post-injury wage to claimant. Claimant, however, argues, under these circumstances, the imputing of a minimum wage was reasonable because claimant at some point will return to work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Claimant started working for respondent, a temporary employment service, on October 21, 1997. Respondent assigned claimant to work at Martin Interconnect Services (Martin).

2. At Martin, claimant's job was to build wiring harnesses which required claimant to cut various gauges of wire by hand and to otherwise use his hands repetitively.

3. On or about November 25, 1997, claimant started having weakness, swelling, and pain in his hands while performing these repetitive work activities.

4. Claimant notified respondent of his hand problems, and respondent initially provided claimant with medical treatment through Dr. Ron Davis at the Via Christi Occupational and Environmental Medicine in Wichita, Kansas.

5. Dr. Davis referred claimant to neurologist Bart A. Grelinger, M.D., to undergo a nerve conduction study. Dr. Grelinger found moderate to severe bilateral carpal tunnel syndrome. He also found there was no ulnar nerve entrapment.

6. Claimant continued to work as Dr. Davis provided conservative treatment for claimant's bilateral upper extremity injuries. Because claimant showed no improvement, Dr. Davis referred claimant for examination and treatment to orthopedic surgeon J. Mark Melhorn, M.D.

7. Dr. Melhorn first saw claimant on March 31, 1998, and diagnosed claimant with bilateral carpal tunnel syndrome. Since conservative treatment had not improved claimant's condition, Dr. Melhorn performed a right carpal tunnel release on May 11, 1998, and a left carpal tunnel release on May 24, 1998.

8. On May 8, 1998, respondent terminated claimant before he underwent the first carpal tunnel release surgery.

9. Dr. Melhorn determined claimant had met maximum medical improvement on July 28, 1998. At that time, in accordance with AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Melhorn opined claimant had permanent functional impairment of both the right and left forearm of 7.05 percent. The doctor combined those forearm impairments for an eight percent whole body permanent functional impairment.

10. Dr. Melhorn permanently restricted claimant's work activities to medium work with a maximum lift or carry of 50 pounds or less; frequent lift or carry of 25 pounds; and task rotation.

11. Claimant gave Dr. Melhorn a history and claimant also testified that his upper extremities were asymptomatic with no history of medical treatment before he started having symptoms on November 25, 1997, while working for the respondent. Nevertheless, Dr. Melhorn opined that 25 percent of claimant's permanent functional impairment preexisted claimant's employment with the respondent.

12. During Dr. Melhorn's deposition, he was provided a description of sheet metal work as requiring a worker to perform hand intensive activities such as bucking rivets, drilling, and using vibratory hand tools in cold environments. The doctor was then asked, from a medical perspective, whether he would encourage claimant to find work within the doctor's restrictions as opposed to looking for sheet metal work. Dr. Melhorn answered "In general, yes."

13. At claimant's attorney's request, claimant was examined and evaluated on November 9, 1998, by rehabilitation and physical medicine physician Pedro A. Murati, M.D. Dr. Murati diagnosed claimant with bilateral post carpal tunnel releases with residual pain and bilateral ulnar nerve cubital syndrome. He restricted claimant's work activities to no ladder climbing, no crawling, occasional repetitive hand controls, occasional repetitive grasping, no heavy grasping, and limited weight to lift/carry/carry/push/pull of 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. Additionally, claimant should not use hooks or knives and vibratory tools.

According to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Murati opined that claimant's bilateral post carpal tunnel releases and ulnar

nerve cubital syndrome resulted in a 21 percent whole person permanent functional impairment.

14. Dr. Murati reviewed Dr. Grelinger's January 7, 1998, nerve conduction study. Dr. Murati testified Dr. Grelinger missed the finding of an abnormality concerning the ulnar nerve in claimant's upper extremities. Dr. Murati felt Dr. Grelinger was only moderately qualified to perform nerve conduction studies because he made an obvious mistake in interpreting claimant's studies.

15. Dr. Grelinger testified that he did not make a mistake in interpreting claimant's nerve conduction studies. In fact, he established that Dr. Murati and not he was the one who had made a mistake in interpreting the studies. Mr. Murati had assumed Dr. Grelinger had used the antidromic testing technique, when in fact, Dr. Grelinger had used the orthodromic technique for testing the ulnar nerve. Dr. Grelinger testified there were no abnormal amplitudes in the ulnar nerve and sensory nerve conduction study.

16. Claimant presented evidence that he had either made application to or otherwise contacted some 15 employers for a job between July 28, 1998, when he was released from Dr. Melhorn's care with permanent restrictions, and March 29, 1999. Claimant also submitted another list of 18 employers he had contacted in a two-day period on March 30 & 31, 1999.

17. Of the first 15 employers claimant contacted, six of those were contacted at a job fair claimant attended in September of 1998. The 18 employers contacted on March 30 & 31 1999, were contacted because the Kansas State Department of Social and Rehabilitation Services (SRS) required claimant to submit a list of 18 employers claimant had contacted before April 1, 1999, or his girlfriend and her children would lose their welfare benefits.

18. Claimant has not worked since his last day of employment with respondent on May 8, 1998. He testified that he was living off the welfare benefits his girlfriend was receiving from the State of Kansas.

19. Respondent and its insurance carrier hired vocational rehabilitation consultant Dan R. Zumalt to interview claimant and develop a vocational placement plan to find claimant employment. Mr. Zumalt saw claimant on two occasions, May 18, 1999, and June 2, 1999.

Mr. Zumalt testified that a plan was developed for claimant to find gainful employment but claimant decided not to participate in the plan because he was involved in a training program paid for by SRS to perform sheet metal work for the Wichita, Kansas, airplane industry. Claimant testified he started the training program on April 5, 1999, and was scheduled to graduate from the program on June 25, 1999. Mr. Zumalt also testified that sheet metal work would be outside claimant's permanent work restrictions.

20. Mr. Zumalt also testified there were numerous opportunities in the electronic industry available for claimant to return to work within his permanent work restrictions earning an average of $10.85 per hour or $434 per week. Additionally, Mr. Zumalt testified there were other numerous opportunities for claimant to work at jobs earning at least $240 per week or $6.00 per hour in the Wichita, Kansas, labor market. Claimant's pre-injury average weekly wage was $242.45 per week or $6.06 per hour.

21. Claimant testified the reason he was participating in the training program for a sheet metal worker was because SRS required him to participate in the training program or his girlfriend and her children would lose their welfare benefits.

22. Claimant testified, if he was offered a comparable wage job, he would not accept the job until the state sponsored training program was successfully completed. He testified, if he dropped out of the program before it was completed, his girlfriend and her children would lose their welfare benefits.

CONCLUSIONS OF LAW

1. In proceedings under the Workers Compensation Act, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and to prove the various conditions on which that right depends.[1]

2. K.S.A. 1997 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 1997 Supp. 44-510e also specifies that a claimant is not entitled to permanent partial general disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

4. The wage component of the work disability test is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for

[1] *See* K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

accommodated work. If claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[2]

5. Even if no work is offered, claimant must show that he or she made a good faith effort to find appropriate employment. If claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.[3]

6. The Appeals Board concludes, following claimant's work-related injury, the respondent did not offer claimant accommodated employment within his permanent work restrictions. But the Appeals Board also finds that claimant then failed to make a good faith effort to find appropriate employment.

On July 28, 1998, Dr. Melhorn determined claimant had reached maximum medical improvement and placed permanent restrictions on claimant's work activities. Claimant applied for a total of 33 jobs from July 29, 1998, through March 31, 1999, a period of 35.14 weeks. This represents less than one job contact per week. Additionally, 18 of the employers were contacted in two days, March 30 & 31, 1999, only because the State of Kansas required those contacts for claimant's girlfriend and her children to remain on welfare. Likewise, claimant enrolled in the sheet metal work training program that exceeded his work restrictions for the sole purpose of retaining his girlfriend's welfare benefits that he also relied on for his own support.

7. The Appeals Board, therefore, concludes the record as a whole establishes, after claimant left respondent's employment because of his work-related injuries, his motivation to contact other employers for jobs and his participation in the sheet metal work training program were not to find appropriate employment, but were to insure his girlfriend's welfare benefits were continued.

Accordingly, since claimant failed to make a good faith effort to find appropriate employment, a post-injury wage should be imputed to the claimant. Respondent presented the only evidence in the record on claimant's post-injury ability to find appropriate employment through the testimony of vocational rehabilitation consultant Dan R. Zumalt. Mr. Zumalt concluded claimant had the ability and jobs were available for claimant to earn a post-injury wage either comparable or in excess of his pre-injury average weekly wage.

The Appeals Board concludes claimant's entitlement to permanent partial disability benefits should be limited to his functional impairment rating. The Appeals Board further finds that the most credible evidence contained in the record in regard to permanent

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[2]Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3]Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

functional impairment is the opinion of claimant's treating physician, Dr. Melhorn. Therefore, the Appeals Board adopts Dr. Melhorn's eight percent whole body impairment rating.

Dr. Pedro Murati's impairment rating should not be given any weight because the Appeals Board finds Dr. Murati's 21 percent whole body rating contains a rating for bilateral ulnar nerve entrapment which was not verified by valid nerve conduction studies.

8. But the Appeals Board finds the record does not prove claimant had preexisting impairment of function in his upper extremities before he went to work for the respondent. There is no evidence claimant's upper extremities were symptomatic or that he received any medical restrictions or limitations to his upper extremities before he started to work for the respondent. Additionally, there is no evidence claimant received any medical treatment or a functional impairment rating was given for a preexisting carpal tunnel syndrome condition before claimant went to work for the respondent.

The Appeals Board is mindful Dr. Melhorn opined, because claimant began to have symptoms in his upper extremities shortly after he started working for the respondent, that 25 percent of claimant eight percent permanent functional impairment was preexisting. The Appeals Board, however, considering the record as a whole, finds the evidence does not establish claimant had a preexisting functional impairment, and, therefore, K.S.A. 1997 Supp. 44-501(c) is not applicable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's July 19, 1999, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary L. Park, and against the respondent, Smith Temporary Services, and its insurance carrier, Legion Insurance Company, for an accidental injury which occurred May 8, 1998, and based upon an average weekly wage of $242.45.

Claimant is entitled to 5.46 weeks of temporary total disability compensation at the rate of $161.64 per week or $882.55, followed by 33.20 weeks of permanent partial disability compensation at the rate of $161.64 per week or $5,366.45 for an 8% permanent partial general disability, making a total award of $6,249.00.

As of May 30, 2000, the entire award of $6,249.00 is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

All other orders entered by the Administrative Law Judge in the Award are approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Terry J. Torline, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director